90-113

Supreme Court, U.S.
FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND JOHN A. TAYLOR,

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 87-3852

April 20, 1990

JOHN A. TAYLOR,

Petitioner-Appellant,

versus

CLINCHFIELD COAL CO.; DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

Respondents-Appellees.

ORDER

There having been no request for a poll of the court on the petitions for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petitions of the Director and Clinchfield for rehearing en banc shall be, and they hereby are, denied.

The panel has considered the petitions for rehearing and is of the opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that the petitions of the Director and Clinchfield for rehearing shall be, and they hereby are, denied.

With the concurrence of Judge Wilkins, Judge Ervin dissents, he would grant the petitions for rehearing for the reasons stated in his dissenting opinion.

/s/ H. E. Widener, Jr.

For the Court

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 87-3852

February 20, 1990

JOHN A. TAYLOR

Petitioner

versus

CLINCHFIELD COAL CO., ET AL

Respondents

ORDER

Upon consideration of the Clinchfield Coal Company's motion for enlargement of time to file petitions for rehearing and suggestion for rehearing in banc,

IT IS ORDERED that the parties are granted until March 16, 1990 within which to file their petitions for rehearing with suggestion for rehearing in banc. If at any time prior to the expiration of the time period as extended any party determines not to seek rehearing, they shall immediately notify the Court in writing of this determination.

For the Court — By Direction

/s/ John M. Greacen

CLERK

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 87-3852

February 15, 1990

JOHN A. TAYLOR

Petitioner

versus

CLINCHFIELD COAL CO., ET AL

Respondents

ORDER

Upon consideration of the Director's motion for extension of time to file petition for rehearing and suggestion for rehearing in banc,

IT IS ORDERED that the motion is granted and the Director is granted an extension of time until March 16, 1990 within which to file a petition for rehearing and suggestion for rehearing in banc. If at any time prior to the expiration of the time period as extended the Director determines not to seek rehearing, the Director shall immediately notify the Court in writing of this determination.

For the Court — By Direction

/s/ John M. Greacen

CLERK

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 87-3852

JOHN A. TAYLOR,

Petitioner,

versus

CLINCHFIELD COAL CO.; DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Review of an Order of
the Benefits Review Board.

Argued: April 14, 1989 Decided: February 5, 1990

Before ERVIN, *Chief Judge*,
and
WIDENER and WILKINS, *Circuit Judges*.

Sherry Lee Wilson (CLIENT CENTERED LEGAL SERVICES OF SOUTHWEST VIRGINIA, INC., on brief) for Appellant. Michael Francis Blair (PENN, STUART, ESKRIDGE & JONES, on brief) for Appellees.

WIDENER, Circuit Judge:

John A. Taylor seeks review of the decision of the Benefits Review Board affirming the denial of his claim for disability benefits pursuant to the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* (1986). The Board upheld the determination of the Administrative Law Judge that Clinchfield Coal

Company had successfully rebutted claimant's presumption of total disability due to pneumoconiosis. On appeal, Taylor argues that application of the interim Labor Department regulation rebuttal provisions, 20 C.F.R. § 727.203(b)(3) and (4), to find rebuttal of his claim, violates 30 U.S.C. § 902(f). We agree with that argument and remand the case for further consideration under the interim Health, Education and Welfare regulation rebuttal provisions found in 20 C.F.R. § 410.490(c).

Taylor applied for Black Lung benefits on November 5, 1976. Initially, the benefits were awarded. Clinchfield Coal Company was named the responsible operator having been Taylor's final employer for a period of more than one year. Clinchfield filed a controversion.

A hearing was held on December 14, 1983, before an Administrative Law Judge who denied the claim on October 26, 1984, having evaluated the claim under the interim Labor Department regulations, 20 C.F.R. § 727.203. The ALJ invoked the interim presumption provided for in § 727.203(a)(3), finding that Taylor satisfied the 10-year requirement of coal mine employment and was totally disabled by pneumoconiosis based on qualifying arterial blood gas studies. However, the ALJ went further and found the presumption rebutted pursuant to § 727.203(b)(3) and (4). He concluded that the physicians' opinions in the record supported his finding of rebuttal that Taylor did not have pneumoconiosis under § 727.203(b)(4) and was "not totally disabled from this disease" under § 727.203(b)(3).[1] The Board affirmed the ALJ's decision on May 14, 1987. This appeal followed.

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[1] In this case, the ALJ determined that the evidence established that Taylor does not have pneumoconiosis, nor was he totally disabled from the disease. From that finding, the ALJ concluded that the presumption was rebutted under § 727.203(b)(3) and (4).

(footnote continues)

Taylor is 55 years old. The record shows that he worked about 12 years in coal mines, his most recent employment being with Clinchfield ending in 1972. Taylor smoked approximately one pack of cigarettes a day for 30 years. He is also 20 pounds overweight for his height.

The medical evidence includes six X-rays between 1971 and 1983. The first reading, from an X-ray taken on June 6, 1971, noted some P-type nodules, but was insufficient to establish pneumoconiosis under the regulations. The next film, taken September 3, 1976, was read showing P and S-type opacities with a profusion of 1/1, which qualifies as a positive reading under the regulations. A January 17, 1977 X-ray was read by Dr. Navani, a B-reader, as consistent with pneumoconiosis. An X-ray dated August 26, 1981, done as part of a physical examination requested by Clinchfield, was read as negative five different times. An X-ray dated February 16, 1983, was read by claimant's physician as positive for the disease, P/Q 1/1; however, Clinchfield's readers found that film negative on three different readings. The last X-ray is dated November 3, 1983, and was read negative twice by Clinchfield's readers. Further, none of the four pulmonary function studies in the record qualifies claimant under the regulations.

As noted, the ALJ invoked the interim presumption on the basis of Taylor's arterial blood gas studies. Of the 7 blood gas studies performed, one in 1976, three in 1981, and three in 1983, the latter three were obviously qualifying under the regulations and the ALJ properly invoked the presumption.

(footnote continued)

Rebuttal under § 727.203(b)(3), however, is accomplished by showing that claimant's total disability "did not arise in whole or in part out of coal mine employment." So, the conclusion drawn by the ALJ from his findings of fact will not support a finding of rebuttal under (b)(3) as to causation. That finding is quite obviously erroneous as a matter of law.

Taylor has seen several physicians, including one at the request of the Department of Labor and two at the request of Clinchfield. His treating physicians, Dr. Kanwal and Dr. Smiddy, diagnosed pneumoconiosis in February of 1983. Chronic bronchitis was the diagnosis of Dr. Tholpady who examined claimant in 1977 at the request of the Department. Dr. Garzon and Dr. Dahhan, who both examined the claimant at the request of Clinchfield, attributed his pulmonary impairment to his cigarette smoking. Also at the request of Clinchfield, Dr. Kress, a non-examining, non-treating physician, reviewed the medical records. His conclusion was that the claimant suffered from chronic bronchitis secondary to his cigarette smoking and obesity. Drs. Kanwal, Smiddy, and Garzon stated in their opinions that claimant's pulmonary impairment was of sufficient severity to preclude him from coal mine work or other comparable employment.

Claimant argues that application of the rebuttal provisions of the interim Labor regulations found under 20 C.F.R. § 703.203(b) violates 30 U.S.C. § 902(f)(2). Under § 902(f)(2), "[c]riteria to be applied by the Secretary of Labor in the case of . . . any claim . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." At this point, we think the history of the dual system of application of the regulations bears repeating. It is described in the case of *Broyles v. Director, OWCP*, 824 F.2d 327, 328-329 (4th Cir. 1987), which was consolidated with *Sebben* and affirmed in the recent Supreme Court decision of *Pittston Coal Group v. Sebben*, 57 U.S.L.W. 4029 (December 6, 1988).

> A miner is entitled to disability benefits under the Black Lung Benefits Act if he is totally disabled by pneumoconiosis arising out of his coal mine employment. See 30 U.S.C. §§ 901(a) and 902(b) (1986). Congress and the various agencies responsible for administering the benefits program have recognized that the existence and causes of pneumoconiosis are difficult to determine, and have over the years established a number of evidentiary presumptions to

assist miners in proving their claims. Regulations creating presumptions to establish the elements of a claim for benefits have been promulgated in accordance with the legislative mandate to give the benefit of the doubt to claimants. *Southard v. Director, OWCP*, 732 F2d 66, 71 (6th Cir. 1984). Congress has repeatedly amended the acts to ensure the liberal award of benefits and to rectify what it perceived as a persistent administrative practice of undue strictness in the award of benefits. *Director v. Bethlehem Mines Corp.*, 669 F2d 187, 190 (4th Cir. 1982).

The "interim presumption" at 20 C.F.R. § 410.490 was promulgated by the Secretary of Health, Education and Welfare in response to the Congressional directive that he loosen the eligibility requirements for benefits and facilitate prompt processing of claims. *Tally v. Matthews*, 550 F2d 911, 916 (4th Cir. 1977). When promulgated, however, 20 C.F.R. § 410.490 by its terms applied only to claims filed by living miners before July 1, 1973 or by their survivors before July 1, 1974. 20 C.F.R. § 410.490(b).

The interim presumption available under 20 C.F.R. § 410.490 is clearly the least restrictive presumption which has ever been available to a black lung claimant. This interim presumption can be established through an x-ray read as showing pneumoconiosis and a showing that the disability arose out of coal mine employment. The only way to rebut this presumption is to show that the claimant is either doing or capable of doing his usual coal mine work. 20 C.F.R. § 410.490. This regulation provides a standard which is easily met. A somewhat similar interim presumption is provided under 20 C.F.R. § 727.203, however, it requires that the miner in question have ten years of coal mine employment.

In contrast, all claims filed after January 1, 1974, see 30 U.S.C. § 931 (1986), were initially adjudicated under more restrictive criteria. These claims were administered by the Secretary of Labor. Initially, no regulations were promulgated to govern the entitlement benefits. Instead, the Secretary of Labor adjudicated these claims under the "permanent" [HEW] regulations located at 20 C.F.R. §§ 410.401-410.476.

Thus, the Secretary of Labor was adjudicating claims only under the more restrictive permanent regulations at the same time the Secretary of Health, Education and Welfare was applying the far more lenient interim presumption available at 20 C.F.R. § 410.490 to claims filed before the magic date of July 1, 1973. Congress, perceiving the inequity, enacted the 1978 amendments to the Act in an effort to make the proof of claims more uniform. *Director v. Bethlehem Mines Corp.*, 669 F2d at 190.

The 1978 amendments added 30 U.S.C. § 902(f)(1)(B), which directed the Secretary of Labor to create new "permanent" criteria governing eligibility requirements. Most significantly for the purposes of this appeal, the 1978 amendments provided at 30 U.S.C. § 902(f)(2):

> Criteria to be applied by the Secretary of Labor in the case of —
>
> * * * * *
>
> (C) any claim filed on or before the effective date of [the new, "permanent"] regulations promulgated under this subsection [*i.e.*, under 30 U.S.C. § 902(F)(1)(D)] by the Secretary of Labor . . .

> shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

Mr. Broyles initially filed his claim on September 17, 1976. Mr. Colley filed his claim on September 18, 1974. The Secretary of Labor did not effectively promulgate the new "permanent" regulations, located at 20 C.F.R. Part 718, until April 1, 1980. In each appellant's case, the ALJ found that because the claimant did not satisfy the requirement that he have been employed in the coal mines for at least 10 years, he was not entitled to the interim presumption available at 20 C.F.R. § 727.203 and his claims had to be evaluated under the more restrictive regulations found at 20 C.F.R. §§ 410.401-410.476. The appellants argue that the interim presumption available under § 410.490 should have applied to their claims.

> In light of Congress' clear mandate in 30 U.S.C.A. 902(f) we agree with appellants' position and reverse and remand the decision of the BRB. It is difficult to imagine that Congress picked the date of June 30, 1973, the last day under which the interim presumption would be available under 20 C.F.R. § 410.490, out of a hat. It is far more likely that Congress intended that the liberal interim presumption available under 20 C.F.R. § 410.490 be applied to all claims filed before such time while the Secretary of Labor promulgated the new "permanent" regulations at 20 C.F.R. Part 718.

In *Sebben*, the Supreme Court upheld the Fourth Circuit decision that since the interim criteria, including 10 years' coal mining employment, needed to invoke the presumption of entitlement applied by the Secretary of Labor in 20 C.F.R.

§ 727.203 are more restrictive than those found in the HEW regulations at 20 C.F.R. § 410.490, the application of § 727.203 instead of the less restrictive § 410.490 violated 30 U.S.C. § 902(f)(2). The Court remanded the claims for consideration of invocation under the less restrictive § 410.490.

The Court stated in its opinion that the decision only applied to the affirmative factors for invoking the presumption of entitlement, not to the rebuttal factors, because the respondents in that case conceded the validity of certain rebuttal provisions, thus not requiring the Court to decide the question. 57 U.S.L.W. at 4032, 4033. The issue raised by claimant here is the rebuttal question reserved in *Sebben*. He urges that the rebuttal provisions under the interim Labor Department regulations are more restrictive than those under the interim HEW regulations. Thus, although the presumption was invoked under § 727.203(a), he argues that he should receive the benefit of the less restrictive rebuttal provisions of § 410.490(c).

At this point, we should say that we think it is a matter of indifference under which set of regulations the presumption arises because for a miner who has 10 years' coal mine employment, regardless of the reason for establishing the presumption, it is precisely the same. Indeed, an examination of the two regulations involved reveals that, except for two or three words, each presumption is the same as the other, *in haec verba*. In §§ 410.490(b) and 410.416, the presumption is phrased that such miner "will be presumed to be totally disabled due to pneumoconiosis" and that "the pneumoconiosis arose out of such [coal mine] employment." The presumption established under § 727.203(a) is that the miner "will be presumed to be totally disabled due to pneumoconiosis . . . arising out of that [coal mine] employment." So we do not accept any argument that the rebuttal provisions must be pegged to the invocation provisions. It is the fact of establishment of the presumption and the substance thereof which is

of consequence in this case, not the number of the regulation which provides for such establishment.

Section 410.490(c) allows for two methods of rebuttal after invocation of the presumption, which we paraphrase:

> (c)(1) Evidence that the miner is performing his usual coal mining or comparable work, or
>
> (c)(2) Evidence, including physical performance tests, that miner is capable of performing his usual coal mining or comparable work.

The interim Labor Department regulations, while containing the two provisions above, add two additional methods of rebuttal under § 727.203(b), which are quoted:

> (b)(3) The evidence establishes that the total disability . . . of the miner did not arise in whole or in part out of coal mine employment; or
>
> (b)(4) The evidence establishes that the miner does not . . . have pneumoconiosis.

Thus, the interim Labor Department regulations permit rebuttal of more elements of entitlement to benefits than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability.

The rebuttal provisions of § 727.203(b)(3) and (4) allow the consideration of evidence disputing both the presence of pneumoconiosis and the connection between total disability and coal mine employment. As rebuttal under § 727.203 permits additional criteria by which more elements of statutory

entitlement may be rebutted, the provisions are more restrictive than those found in § 410.490 and their application violates 30 U.S.C. § 902(f).[2]

In this case, as mentioned, the ALJ determined that claimant's presumption was rebutted by evidence which established the rebuttal provided for by § 727.203(b)(3) and (4).[3] However, had the rebuttal aspect of Taylor's claim been considered under the less restrictive provisions of § 410.490(c), the establishment of rebuttal because of the elements mentioned in § 727.203(b)(3) and (4) would not have been considered. The respondents argue that *Sebben* has no application to the case at hand as the claimants in that case had fewer than 10 years of coal mine employment. Although that is a factual distinction, the *Sebben* decision is not so narrowly fact specific. The relevant issue in *Sebben* is the interpretation of 30 U.S.C. § 902(f)(2) in respect to the difference in application of the interim Labor Department regulations by the Secretary of Labor and the interim HEW regulations by the same Secretary. The Court gave § 902(f)(2) a literal application in *Sebben*, and we see no reason to question a similar application here.

In the text of this opinion, we have, sometimes with some specificity, indicated the difference between the rebuttal provisions of § 410.490(c) and § 727.203(b). Those parts of the opinion were written with the literal wording of the regulations in mind, as well as the reasoning of *Broyles* that the "only way to rebut this presumption [under § 410.490] is to show that the claimant is either doing or capable of doing his

---

[2] We realize that our decision is inconsistent with that of *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989) which refused to extend that circuit's precedent to the rebuttal provisions. *Milliken* held that, although, following *Sebben*, the invocation of the presumption would be controlled by § 410.490, the rebuttal would be governed by Part 727 provisions, even though they were more restrictive. A result with which, with respect, we do not agree.

[3] As to § 727.203(b)(3) rebuttal, see n.1, supra.

usual coal mine work."[4] In affirming *Broyles*, however, the Court in *Sebben*, 57 U.S.L.W. at 4031, held that there are three elements necessary for a successful claim under the black lung statutes. They are: (1) pneumoconiosis, which was (2) caused by coal mine employment, and (3) resulting total disability. The Court pointed out at 57 U.S.L.W. at 4030 that the presumption of causation arising because of 10 years' coal mine employment and found in § 410.416 was subject to rebuttal. That rebuttal provision is similar to that described in § 727.203 (b)(3). So the rebuttal provisions of § 410.490(c), together with § 410.416 and § 727.203(b), have three points of similarity, as applicable in this case, in view of the *Sebben* decision, instead of only two as the face of §§ 727.203(b) and 410.490(c) would indicate. That also, of course, would have to qualify our opinions in *Broyles*, at 824 F.2d at 329, that the "only" way to rebut the presumption under § 410.490 is by evidence with respect to total disability. Nevertheless, that leaves § 727.203(b)(4) rebuttal, on the basis that the miner does not have pneumoconiosis, as an additional and restrictive provision not found in the interim HEW regulations in § 410.490(c). So, applying the more restrictive regulation in rebuttal is a violation of 30 U.S.C. § 902(f).

We remand the claim to the Board for further remand to an ALJ to determine if the evidence in the case meets the

[4] Accord *Couch v. Secretary, HEW*, 774 F.2d 163, 166 (6th Cir. 1985); *Vinston v. Califano*, 592 F.2d 1353, 1356 n.3 (5th Cir. 1979).

rebuttal provisions under § 410.490(c) or the rebuttal provisions as to causality of § 410.416 if the miner claims under § 410.416.[5]

PETITION GRANTED AND
REMANDED WITH INSTRUCTIONS.[6]

ERVIN, Chief Judge, dissenting:

I respectfully dissent.

As pointed out in footnote 2, my brethren concede that their holding is inconsistent with the decision of the Sixth Circuit in *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). More recently, the Third Circuit has come down on the side on the Sixth in *Bethenergy Mines Inc. v. Director, OWCP and Pauley*, ____F.2d ____, No. 89-3364 (3d Cir. Dec. 7, 1989). Although the rationale employed by these two courts differ somewhat, I am more comfortable with the results they have reached than the one suggested by the majority here and by the Seventh Circuit in *Taylor v. Peabody Coal Co.*, ____F.2d ____, No. 86-2590 (7th Cir. Aug. 28, 1989). It seems to me that by adopting the views of the Third and Sixth Circuits concerning these murky and

[5] The ALJ states in conclusory fashion in his opinion that as the claim did not meet Part 727, he also reviewed it and found that it did not satisfy the requirements of Part 410. The ALJ's decision was filed before the Supreme Court decision in *Sebben*; therefore, we may safely assume that the ALJ was referring to Part 410.401 *et seq.* In all events, it is the decision of the Board that we review, not the decision of the ALJ. The decision of the Board did not mention, consider, or rely on Part 410, so under *S.E.C. v. Chenery*, 318 U.S. 80 (1943), that is not a part of the administrative decision subject to review.

[6] While it may be arguable that the erroneous finding of the ALJ, affirmed by the Board, that there was rebuttal under § 727.102(b)(3) would constitute a trial of that issue and the subject not be again open for further consideration, that is not the case here. The administrative decision applied the wrong standard, and although consideration of the rebuttal of the presumption under § 410.416 as construed in *Sebben* deals with the same subject, causation, as § 727.203(b)(3), we think the claimant can have no complaint if the evidence in the case is considered on remand under the proper standard.

confusing regulations we do less violence to congressional intent, and avoid both upsetting the statutory scheme and raising due process problems. To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me.

For the reasons articulated by our sister circuits in *Milliken* and *Bethenergy*, I would affirm the denial of benefits to Taylor.

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036
BRB No. 84-2444 BLA
OWCP No. 401-40-9901

JOHN A. TAYLOR
Claimant-Petitioner

v.

CLINCHFIELD COAL COMPANY
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

} DECISION and ORDER

NOT - PUBLISHED
May 14, 1987

Appeal of the Decision and Order-Rejection of Claimant of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

J. Thadieu Harris, III (Wolfe & Farmer), Norton, Virginia, for claimant.

Ellen Joyce-Barry (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Before: BROWN and DOLDER, Administrative Appeals Judges and CLARKE, Administrative Law Judge.*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. § 921(b)(5) (West 1986).

PER CURIAM:

Claimant appeals the Decision and Order (81-BLA-3019) issued by Administrative Law Judge Joel R. Williams denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act).

Based on 11.75 years of coal mine employment and qualifying blood gas studies, the administrative law judge found that claimant had established invocation of the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. § 727.203(a)(3). The administrative law judge further found that the Employer had established rebuttal of this presumption pursuant to 20 C.F.R. §§ 727.203(b)(3) and (b)(4), and consequently denied benefits. On appeal, claimant challenges the administrative law judge's finding that the evidence establishes rebuttal. Employer argues in favor of the administrative law judge's Decision and Order.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that it was error for the administrative law judge to weigh non-qualifying ventilatory studies and non-qualifying x-rays in considering whether rebuttal has been established, citing, *Hampton v. Benefits Review Board*, 678 F.2d 506 (4th Cir. 1982) and *Whicker v. Benefits Review Board*, 733 F.2d 346 (4th Cir. 1984).

In determining whether rebuttal of the interim presumption has been established, the administrative law judge considered all the relevant evidence, including non-qualifying x-rays and test results and medical opinions. 20 C.F.R. § 727.203(b). This is consistent with the recently issued decision, *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424,

8 BLR 2-109 (4th Cir. 1986) (*en banc*). Claimant's contention, therefore, that the administrative law judge should consider on rebuttal only those objective studies with positive results and the medical opinions based on such studies is without merit.

Accordingly, the Decision and Order-Rejection of Claim is affirmed.

SO ORDERED.

/s/ James F. Brown

JAMES F. BROWN
Administrative Appeals
Judge

/s/ Nancy S. Dolder

NANCY S. DOLDER
Administrative Appeals
Judge

/s/ David A. Clarke, Jr.

DAVID A. CLARKE, JR.
Administrative Law Judge

Dated this 14th
day of May 1987

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of JOHN A. TAYLOR Claimant v. CLINCHFIELD COAL COMPANY Employer and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS Party-in-Interest	Date Issued: 26 Oct 1984 CASE NO. 81-BLA-3019 OWCP NO. 401-40-9901

J. Thadieu Harris, III, Esq.
Wolfe & Farmer
For the Claimant

Ellen Joyce Barry, Esq.
Penn, Stuart, Eskridge & Jones
For the Employer

Before: JOEL R. WILLIAMS
Administrative Law Judge

DECISION AND ORDER - REJECTION OF CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901, *et seq.* In accordance with the Act and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs on July 1, 1981, for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis. Benefits are also awardable to the survivors of persons whose death was caused by pneumoconiosis, and, for claims filed prior to January 1, 1982, to the survivors of persons who were totally disabled from pneumoconiosis at the time of their deaths. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Abingdon, Virginia, on December 14, 1983, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 Code of Federal Regulations.

The record was left open after the hearing to permit the deposing of Dr. G.S. Kanwal by counsel for the defendant. (Tr.7)[1] This deposition has been submitted and is admitted into evidence as Employer's Exhibit 18.

Issues

The specific issues presented for resolution are:

1) Whether Claimant is a miner as defined by the Act and regulations;

2) Whether the Claimant worked at least ten years in qualifying coal mining employment;

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[1] The following abbreviations will be used when citing to the record in this matter:

DX — Director's Exhibit
CX — Claimant's Exhibit
EX — Employer's Exhibit
TR — Transcript of the hearing.

3) Whether the Claimant has pneumoconiosis as defined by the Act and regulations;

4) Whether Claimant's pneumoconiosis arose out of coal mine employment;

5) Whether the Claimant is totally disabled;

6) Whether the Claimant's disability is due to pneumoconiosis;

7) Whether Claimant can do comparable and gainful work;

8) Whether Defendant is liable for any benefits assessed by reason of the Claimant's marital status as defined by the Act and regulations; and

9) Whether the statutes and regulations under which this claim is being prosecuted are unconstitutionally discriminatory and arbitrary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Coal Miner

The claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations. A miner for purposes of § 725.202 ". . . is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works in or around a coal mine or coal preparation facility." (20 C.F.R. 725.202). Claimant states that he was a coal loader for 18 months in 1947-'49. (Tr.13,15) The employment as a coal loader required that Claimant push the cart that had been loaded with coal within the mine. (Tr.14) Claimant testified that he worked an abandoned mine with his father from the fall of 1956 to 1962. (Tr.32) At that time Claimant states that he was required to ". . . lay up the track, set the timbers, drill the holes, shoot it, load it in the car and bring it to the outside and dump it." (Tr.17) Claimant states

that he worked as a roof bolter, coal loader and a dust machine helper for Lambert Coal Company from 12/1/62 through 12/31/63. (Tr.19; DX2; DX4) Claimant states that he worked for Clinchfield Coal Company as primarily a roof bolter within the mine from 1969 through 1972. (Tr.20; DX5) Given the above uncontradicted description by Claimant of his employment in the mine for all periods spent as a coal mine employee, I find that Claimant is a person who has worked in and around a coal mine in the extraction of coal and in coal mine construction and maintenance.

Length of Coal Mine Employment

Neither the Act nor the Regulations contain guidelines for computing the length of coal mine employment. The Benefits Review Board has held that such computations should be based on some reasonable method with the result supported by substantial evidence in the record considered as a whole. *Wilkerson v. Georgia Pacific Corp.*, 1 BLR 1-830 (1978). Further, where there is no documentary evidence available, the Administrative Law Judge may reply on the Claimant's uncontradicted testimony. *Gibert v. Williamson Coal Company, Inc.*, 3 BLR 3-67, 79 BLA 358 (April 22, 1981). Claimant's testimony as to employment in 1947 through 1948 for an eighteen month period and in 1956 through 1962 is not supported by social security records or employer records. The Claimant was able to relate these periods of work to the period of his military service which is shown in the 1971 records by Southwestern State Hospital (DX19) as being from 1949 to 1956. I find his testimony to be creditable in this regard.

Claimant has statements from Lambert Coal Company and Clinchfield Coal Company verifying coal mine employment from 12/1/62-12/31/63 and 6/17/69-8/23/72 respectively. (DX4,5) Therefore, relying on Claimant's uncontradicted testimony, and employer statements, I find

the Claimant has sustained the burden of proof in establishing 11¾ years of coal mining employment. *Renie v. U.S. Steel Corp.*, 1 BLR1-859 (1978).

Date of Filing

The Claimant filed his claim for benefits under the Act on November 5, 1976. The claim is timely filed.

Responsible Operator

The Clinchfield Coal Company is the last employer for whom the miner worked for a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case under Subpart F of Part 725 of the regulations. (DX1,2,5)

Dependents

The Claimant has one dependent for purposes of augmentation of benefits under the Act, namely, his wife, Lucille A. Taylor.

Pneumoconiosis and Total Disability

In order to be eligible for benefits, claimant must prove that he is totally disabled due to pneumoconiosis arising out of his coal mine employment. Under § 727.203 of the regulations (the interim presumption), a claimant with ten or more years of coal mine employment will be presumed to be totally disabled due to pneumoconiosis arising out of that employment if one of four medical criteria is met. Since claimant has more than ten years of qualifying coal mine employment, the evidence must be evaluated to determine if he meets the medical criteria set out in § 727.203(a)(1)-(4) of the regulations.

The presumption may be invoked under subsection (a)(3) if blood gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values specified therein.

In order to meet the subsection (a)(3) standards, if the arterial $_pC02$ is 39, the arterial $_p02$ must be equal to or less than 61 mm.Hg. If the $_pC02$ is 38, the arterial $_p02$ must be equal to or less than 62 mm. Hg. If the $_pC02$ is 35, the arterial $_p02$ must be equal to or less than 65 mm. Hg. If the $_pC02$ is 34, the arterial $_p02$ must be equal to or less than 66 mm. Hg. If the $_pC02$ is 31, the $_p02$ must be equal to or less than 69 mm. Hg.

All conflicting blood gas studies must be weighed prior to invocation of the presumption under subsection (a)(3). (*Stiner v. Bethlehem Mines Corporation*, 3 BLR 1-487 (BRB, 1981) (Supra)). As pneumoconiosis is a progressive and irreversible disease, greater weight may be given to the most recent evidence (*Call v. Director, OWCP*, 2 BLR 1-146 (BRB, 1979)). Either an at rest or exercise blood gas level may be used to invoke the presumption as long as the administrative law judge explains why one test is chosen over another. (*Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972 (BRB, 1980)).

A blood gas study performed on 9/3/76 produced a $_pC02$ of 38.2 and a $_p02$ of 81.7 before exercise. (DX12)

A blood gas study done on 2/20/81 produced a $_pC02$ of 35.0 and a $_pC2$ of 72.3 before exercise. (EX5)

A blood gas study done on 2/26/81 produced a $_pC02$ of 33.6 and a $_p02$ of 68.2 before exercise. (EX6)

A blood gas study done on 8/26/81 produced a $_pC02$ of 32 and a $_p02$ of 66 before exercise and a $_pC02$ of 31 and a $_p02$ of 68 after exercise. (EX1)

A blood gas study done on 1/10/83 produced a $_pC02$ of 38.5 and a $_p02$ of 72.7 before exercise. (EX7)

A blood gas study done on 2/16/83 produced a $_pC02$ of 37.8 and a $_p02$ of 53.7 before exercise. (CX1)

A blood gas study done on 11/3/83 produced a $_pC02$ of 34.3 and a $_p02$ of 59.3 before exercise and a $_pC02$ of 30.6 and $_p02$ of 71.2 after exercise. (EX12)

The latest three blood gas studies done on 1/10/83, 2/16/83 and 11/3/83 are qualifying studies under the regulations except for the after exercise results of the 11/3/83 test. The before exercise results of the 11/3/83 test are in accord with two previous and recent tests. The etiology of the Claimant's hypoxemia[2] is of no concern in determining whether the presumption has been raised under subsection (a)(3). Rather, it is a matter to be considered in rebuttal. I conclude that the presumption has been invoked.

The presumption which arises under § 727.203(a) may be rebutted by one of the four methods set forth in § 727.203(b). All relevant medical evidence must be considered on rebuttal.

The presumption may be rebutted under subsection (b)(3) if it is established that the miner's disability did not arise in whole or in part out of his coal mine employment.

Subsection (b)(3) is for consideration where it is alleged that a proven, totally disabling respiratory impairment is caused by a condition other than one arising out of coal mine employment (*Van Nest v. Consolidation Coal Company*, 3 BLR 1-526 (BRB, 1981)).

In *Blevins v. Peabody Coal Co.*, BRB No. 81-2085 BLA (1983) the Board held that evidence purporting to establish causation due to smoking must meet the "four prong test" given in *Blevins v. Peabody Coal Co.*, 1 BLR 1-1023 (1979). The "four prong test" requires the medical expert to

> (1) explain whether it is possible to distinguish between pulmonary disability caused by smoking and that caused by coal dust exposure with any degree of medical certainty;

---

[2] There is general agreement by the physician's who have rendered opinions in this case that the blood gas studies do demonstrate hypoxemia although of varying degrees.

> (2) explain whether there are sufficient facts to permit a distinction to be made in a particular case;
>
> (3) state his opinion as to the origin of claimant's pulmonary disability;
>
> (4) explain how the evidence of record supports his conclusion. (*Blevins*, (1979) p.1029)

The presumption can also be rebutted under subsection (b)(4) by establishing that the miner does not have pneumoconiosis.

Citing *Ansel v. Weinberger* 529 F2d 304 (6th Cir. 1976) and *United States Steel Corporation v. Gray*, 588 F2d 1022 (5th Cir. 1979), the Benefits Review Board held in (*Murphy v. Consolidation Coal Company*, 3 BLR 1-575 (1981)) that evidence consisting solely of radiologists' interpretations of X-rays as negative for existence of pneumoconiosis is insufficient to rebut the presumption under subsection (b)(4). But other medical opinion, based only in part on negative chest X-rays or based on evidence other than negative chest X-rays may suffice to make this showing.

The record contains fourteen readings of six different X-rays, of which three are positive and eleven are negative for pneumoconiosis. Only one of the positive readings is by a "B" reader though the other two positive readings were done by Board Certified Radiologists. Also two of the positive readings were done in 1976 and 1977. Three separate X-rays taken 8/26/81, 2/16/83 and 11/3/83 with eleven readings are all negative except for a positive reading of 2/16/83 by Larry H. Westerfield, M.D. Giving more weight to the "B" reading and the latest X-rays, I find that the presumption is not raised under subsection (a)(1) by the X-ray evidence.

None of the five pulmonary function studies of record produced values which would have qualified for the presumption under §727.203(a)(2).

The record includes the report of S.S. Tholpady, who evaluated the miner on behalf of the Department of Labor on January 17, 1977. (DX11) The doctor took the miner's work and health histories and performed a physical examination. A chest X-ray and pulmonary function study was also done in connection with his examination.

G.S. Kanwal, M.D., has treated the Claimant from February 1981 until present. His reports and deposition are of record. (EX18)

Contained in the record is the report of A. Dahhan, M.D., who evaluated the miner on behalf of Employer on August 26, 1981, took the miner's work and health histories and performed a physical examination. Associated with the report were the results of a chest X-ray, a pulmonary function study and a blood gas study.

Also included in the record is the report of J.F. Smiddy, M.D., who evaluated the miner on behalf of Claimant on February 16, 1983. (CX1) Dr. Smiddy took the miner's work and health histories and performed a physical examination. He also had the results of a chest X-ray, a pulmonary function study and a blood gas study done on February 16, 1983. (CX1)

A medical report has been submitted by F.L. Garzon, M.D., who evaluated the miner on behalf of Employer on November 3, 1983. (EX12) Dr. Garzon took the miner's work and health histories and performed a physical examination. He also had the results of a chest X-ray, a pulmonary function study and a blood gas study done on November 3, 1983.

Substantially all of the evidence identified above has been reviewed on behalf of the employer by G.O. Kress, M.D. He also reread the three most recent X-rays. His analysis and opinion is included in the record. (EX13)

Dr. Tholpady diagnosed the Claimant's cardiorespiratory condition as chronic bronchitis and opined that it was

unrelated to dust exposure in the patient's coal mine employment.

In his report of February 15, 1983, Dr. Kanwal noted that the Claimant had a "marked degree of lung disease" but he did not offer any differential diagnosis. In his deposition, he stated that the Claimant had chronic bronchitis. He opined that smoking would be the number 1 cause of this disease. Dr. Kanwal stated further that although exposure to coal dust, as such, does not cause chronic bronchitis, exposure to coal mine gas could.[3] He further testified that he had also entered a diagnosis of pneumoconiosis in his notes on the Claimant's first visit. However, he acknowledged that this was done without any recorded history concerning the nature of the Claimant's coal mine work and without the benefit of any X-rays, pulmonary function studies or blood gas tests.

Dr. Dahhan diagnosed Claimant's condition as " . . . chronic bronchitis due to his excessive smoking habits with no evidence of occupational pneumoconiosis." (EX1) He based his opinion on pulmonary function findings, physical exam, records provided and an arterial blood gas study. (EX8 pg.12,13). Specifically, Dr. Dahhan states that "[t]he thirty-pack years would be consistent with causing areas of ventilation perfusion mismatch that would result in the blood gas picture that was demonstrated." (EX pg.12,13)

Dr. Smiddy concluded as follows:

> This patient has sufficient coal workers pneumoconiosis to produce a severe respiratory impairment documented by all the objective evidence at hand but in particular documented by the severe arterial hypoxemia which is present and this patient's health would be sufficiently impaired to preclude the type of physical activity required for underground coal mine employment. A portion of this patients lung

[3] The Claimant has testified that he had not been exposed to gases of any kind. (T.26)

disease is certainly chronic obstructive pulmonary disease secondary to prior cigarette smoking.[4]

Dr Garzon diagnosed Claimant's condition as chronic bronchitis, early pulmonary emphysema, exogenous obesity, anxiety neurosis and depression based on a physical examination, X-ray, pulmonary and blood gas studies. (EX12)

Dr. Kress diagnosed Claimant's condition as chronic bronchitis. (EX13) Specifically, he states

> (c)hronic bronchitis can produce abnormal blood gas studies by causing a ventilation perfusion mismatch . . . . Again, then I believe this man's *demonstrable hypoxemia is secondary to first his obesity and secondly his chronic bronchitis.* As to the *etiology of his chronic bronchitis I think it is without question secondary to his years of cigarette smoking.* It is, of course, recognized that individual(s) with excessive dust exposure may develop what is known as environmental or industrial bronchitis. Removal of these individuals from dust exposure will result in clearing of this type of bronchitis within six months or so. This man has been away from his occupational dust exposure for perhaps as much as 11 years but, indeed, has continued his habit of cigarette usage. I think quite clearly then that his on going productive cough which is diagnostic of chronic bronchitis is related to his smoking history and not to his coal mine employment . . . .
>
> In an individual with a perfectly normal vital capacity, indeed, at times above predicted normal, with a normal diffusing capacity which has been demonstrated on two occasions, I do not believe that

[4] The cigarette smoking history recorded by Dr. Smiddy was 1/2 pack per day for 30 years. The Claimant reported to other examiners that he smoked a full pack per day until about 1981.

> he has any impairment that could be possibly attributed to coal workers' pneumoconiosis. (EX13 p.6)

From the foregoing opinions, I conclude that the Employer has established by the preponderance of the evidence that the Claimant does not have pneumoconiosis[5] and that he is not totally disabled from this disease. Accordingly, the presumption is rebutted under both subsections (b)(3) and (b)(4).

As the claim can not be allowed under Part 727, I have also reviewed it under Part 410. Based on the foregoing evidence, I am unable to make the requisite finding that the Claimant is totally disabled as the primary result of pneumoconiosis.

It follows from my findings and conclusions that the Claimant is not entitled to benefits under the Act.

Attorney Fees

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case the Act prohibits the charging of any fee to the Claimant for representation services rendered to him in pursuit of his claim.

ORDER

The claim of John Taylor for benefits under the Act is denied.

/s/ Joel R. Williams

JOEL R. WILLIAMS
Administrative Law Judge

[5] Defined as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment (§ 727.202).

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision, by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C., 20036. (20 CFR 725.481)

U.S. CONST.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

30 U.S.C. § 901(a)

§ 901. Congressional findings and declaration of purpose; short title

(a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

30 U.S.C. § 902(f)

§ 902. Definitions

For purposes of this subchapter—

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) Such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

30 U.S.C. § 923(b)

§ 923. Filing of notice of claim

(b) Utilization of personnel and procedures; evidence required to establish claim; medical evidence; affidavits; autopsy reports; reimbursement of expenses

In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 223 of the Social Security Act [42 U.S.C.A. § 423], but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Where there is no medical or other relevant evidence in the case of a deceased miner, such affidavits, from persons not eligible for benefits in such case with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis. In any case, other than that involving a claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981, in which there is other evidence that a miner has a pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in

support of a claim for benefits under this subchapter if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the claim has been fraudulently represented. In order to insure that any such roentgenogram is of adequate quality to demonstrate the presence of pneumoconiosis, and in order to provide for uniform quality in the roentgenograms, the Secretary of Labor may, by regulation, establish specific requirements for the techniques used to take roentgenograms of the chest. Unless the Secretary has good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, the Secretary shall accept such autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 221 of such Act [42 U.S.C.A. § 421(a) to (d), (g)] shall be applicable. The provisions of sections 204, 205(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 206, 207, and 208 of the Social Security Act [42 U.S.C.A. §§ 404, 405(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 406, 407, 408], shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under Title II of such Act [42 U.S.C.A. § 401 et seq.]. Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.

30 U.S.C. § 932(c)

§ 932. Failure to meet workmen's compensation requirements

(c) Persons entitled to benefits

Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator; or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

20 C.F.R. § 410.490

§ 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such

miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as

the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli

to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.